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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/779,756	02/08/2001	John Howard Pasch	67052	4659

22242 7590 10/04/2002

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120 SOUTH LA SALLE STREET  
SUITE 1600  
CHICAGO, IL 60603-3406

EXAMINER

TRAN LIEN, THUY

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 10/04/2002

7

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.  
**09/779,756**

Applicant(s)  
**Pasch et al**

Examiner  
**Lien Tran**

Art Unit  
**1761**



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on Feb. 8, 2001
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-30 is/are pending in the application.
- 4a) Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-30 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some\* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s). 5,6 6) ☐ Other:

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1. Claims 1-30 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In all relevant claims, the term “high protein wheat flour” is indefinite because it is not known what would be considered as “high”; the term “high” is relative.

In claim 4, what does applicant mean by “similar nisin-containing cultured whey”?; it is not known what is encompassed by such language.

Claims 5-6 have the same problem as claim 4.

Claims 14,15, 16, 24,25 and 26 have the same problem as claim 4.

2. Claims 1,11 and 21 are rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for a product that is shelf stable at refrigeration temperature for 120 days, does not reasonably provide enablement for product having infinite shelf stability at refrigeration temperature. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to carry out the invention commensurate in scope with these claims.

The specification discloses the product is shelf stable at refrigeration temperature for 120 days or more; however, there is no data or showing that the product is shelf stable for a significant period of time exceeding 120 days. The language “at least 120 days” in the claims encompasses an extended period of time exceeding 120 days and the specification does not have any evidence

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to lead one to conclude that the product is shelf stable for such period of time or have infinite shelf stability.

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459

(1966), that are applied for establishing a background for determining obviousness under 35

U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
  2. Ascertaining the differences between the prior art and the claims at issue.
  3. Resolving the level of ordinary skill in the pertinent art.
  4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
5. Claims 1-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bajracharya et al in view of Taylor(4597972) and Nauth et al (6110509).

Bajracharya et al disclose a shelf-stable pre-cooked filled pasta product and a process for preparing it. The pasta is prepared from a dough comprising 70-95% flour, about 2-20% wheat gluten, 15-35% water. Dehydrated egg material may be included in an amount up to about 22% and glyceryl monostearate is added in amount of from .5-5%. The dough is acidified to a pH as

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high as 5.5. The pasta is filled with a filling having a pH as high as 5.5. The pastas are pasteurized under modified atmospheric condition. The flour used is durum or wheat flour.

Bajracharya et al do not teach adding nisin-containing culture whey and the way in which the nisin-containing culture whey is obtained.

Taylor discloses nisin as an antibotulinal agent for food products. He teach to use nisin to control heat-resistant spore of *Clostridium botulinum* and low acid foods with pH values above about 4.5 are susceptible to *C. Botulinum* growth. (See col. 1)

Nauth et al teach a method to obtain the nisin containing whey (see col. 3)

Since the Bajracharya et al is a low acid food products which are known to be susceptible to *C. botulinum* growth, it would have been obvious to one skilled in the art to add nisin as taught by Taylor to obtain the benefit taught by Taylor which in turn makes the Bajracharya et al safer for consumption and further enhances the shelf stability of the product. As the amounts, this can be done by experimenting with different amounts to determine the one which will give the most optimum result. One can follow the teaching of Taylor as a guideline to determine the appropriate amount. As to the way to obtain the nisin, it would have been obvious to use any known method to obtain the nisin. The method claimed is known as shown by Nauth et al. The nisin as taught by Nauth et al is advantageous to the Bajracharya et al since the nisin is contained in the whey which will further increase the protein content of the pasta product; this further enhances the nutritious value of the product.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien Tran whose telephone number is 703-308-1868. The examiner can normally be reached on Wed-Fri. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9310.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

September 29, 2002

  
LIEN TRAN  
PRIMARY EXAMINER  
*Group 1700*